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UNITED STATES OF AMERICA

v.

DAVID M. HICKS

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)  
) **Defense Motion to Dismiss for**  
) **Lack of Jurisdiction: Commission**  
) **System Will Not Afford a Full and**  
) **Fair Trial**  
)

) 4 October 2004  
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The defense in the case of the *United States v. David M. Hicks* moves for dismissal of the charges against Mr. Hicks, and in support thereof states the following:

1. **Synopsis:** The commission should dismiss the charges against Mr. Hicks because the procedures promulgated by the President in his Military Order of 13 November 2001 (PMO) and the Secretary of Defense in Military Commission Order No. 1 (MCO No. 1) for trials by military commission (hereinafter the "commission system") is based on an outdated system that abjectly fails to provide due process and/or substantive and procedural provision sufficient to guarantee the full and fair trial required by the PMO.

2. **Discussion:**

**A: Introduction**

The commission system described in the PMO and MCO No. 1, and designed for the trials of the Guantanamo detainees, including Mr. Hicks, represents a giant step backward in time, both substantively and procedurally. The construction of the commission system to try Mr. Hicks for alleged criminal conduct denies him basic and fundamental rights recognized in both the civilian and military justice systems in the U.S.

The commission system bears a striking resemblance to the system in place prior to the advent of the Uniform Code of Military Justice (UCMJ) – a system rejected a half-century ago as flawed and unfair. Furthermore, the commission system ignores procedures utilized in the early 1950's by the United Nations to govern Military Commissions of the United Nations Command, Korea (hereinafter the "Korean Commission Rules"). Those procedures, which themselves were not the equal of the UCMJ in terms of safeguarding rights, provided significantly more protection for the accused than does the current commission system.

The failure of the proposed commission system to incorporate the minimal protections for the accused provided by the Korean Commission Rules and the UCMJ makes it impossible for the commission to provide a full and fair trial as directed by the President. Accordingly, the charges against Mr. Hicks before this commission must be dismissed.

## **B: Pre-UCMJ Military Justice and Early Reform Efforts**

Before enactment of the UCMJ, both the Naval and Military justice systems were seriously flawed. The systems were intended to secure obedience, and to ensure that soldiers and sailors served the commander's will.<sup>1</sup> Although both systems provided for courts-martial, they did not resemble today's military courts at all. Courts-martial were merely a tool of the commander to fulfill his intentions regarding discipline.<sup>2</sup> There was little, if any, relation to civilian criminal justice. Protecting the rights of the individual was not a primary purpose of the system.<sup>3</sup> As a result, great injustices were done in the name of discipline.<sup>4</sup>

During WWII, more than sixteen million men and women served in the armed forces.<sup>5</sup> Many of these individuals experienced military justice from one side or the other during their service. For many, the experience represented an injustice of considerable magnitude.<sup>6</sup> As a result, many individuals and institutions lobbied Congress for changes to the system -- highlighting flaws in the system including the fact that defense counsel were not lawyers; that law officers who presided over trials were not lawyers; and that there was no mechanism to review and correct trial errors and/or inappropriate and disproportionate sentences.<sup>7</sup>

In the years after WWII, there were some minor reforms aimed primarily at providing adequate appellate review for courts-martial. But it was not until 1948 that the pace of military justice reform quickened. With the creation of the U.S. Air Force, the

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<sup>1</sup> John S. Cooke, *Article: Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 Mil. L. Rev. 1, 3 (2000).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See id.* at 5. One such tragic event in World War I (WWI) sparked interest in reforming the military justice system. In August of 1917 sixty-three soldiers were court-martialed on charges of mutiny and murder stemming from racially charged riots in Houston, Texas. Of the sixty-three soldiers tried, many were acquitted, others were sentenced to prison terms, and thirteen, all black, were sentenced to death by hanging. The sentences were carried out the day after the trial. No report or message about the trials or the impending sentence was sent to any superior unit, or to Washington, D.C. The soldiers were simply hanged in prompt compliance with the law as it existed at the time. However, this incident and others eventually received significant national attention that precipitated sweeping reform, including review of the courts-martial system. *Id.*

<sup>5</sup> *See* DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED: U.S. MILITARY PERSONNEL SERVING AND CASUALTIES 2 (2003), *available at* <http://www.dior.whs.mil/mmjd/casualty/wcprincipal.pdf>. *See also* Cooke, *supra* note 1 at 6.

<sup>6</sup> *See generally* Cooke, *supra* note 1 at 6 (During WWII, the services conducted over 2,000,000 courts-martial).

<sup>7</sup> *Id.*

debate turned toward the need for a system of military justice for the armed forces as a whole.<sup>8</sup> As a result, Congress enacted the Uniform Code of Military Justice in 1950. The enactment of the UCMJ heralded Congress' campaign to change the thrust of military justice from a command-dominated system to one that mirrored the civilian criminal justice system by emphasizing due process and fairness.<sup>9</sup> The UCMJ instituted many notable changes to the system. It created the position of law officer--the forerunner of the military judge--so that a lawyer, rather than a line officer, presided over courts-martial.<sup>10</sup> Under the UCMJ, the accused was for the first time afforded the right to be represented by a qualified attorney in general courts-martial.<sup>11</sup> The UCMJ also codified protections against self-incrimination fifteen years before the Supreme Court's decision in *Miranda v. Arizona*,<sup>12</sup> and codified other rules designed to ensure that only competent evidence reached the fact-finder. Nevertheless, serious problems still plagued the system.

### C: Changes to UCMJ Since 1950: Independent Military Judiciary

Over the past 50 years, the UCMJ and military justice system have changed dramatically.<sup>13</sup> The change that has had perhaps the most impact on the quality of justice dispensed at the trial level has been the creation, in 1968, of a dedicated trial judiciary. The improvements in the system ushered in by the creation of a dedicated military trial judiciary have resulted in a justice system notable for high quality courts-martial, the procedures of which comport with the requirements of international law, and the findings and sentences of which overwhelmingly withstand review on appeal.

Before 1968, the UCMJ provided a "law officer" to preside over courts-martial. The law officer was a judge advocate, designated as the "legal arbiter" for a court-martial.<sup>14</sup> A member of the judge advocate's staff, and designated by the convening authority for each court-martial,<sup>15</sup> the law officer possessed some power to rule on

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<sup>8</sup> *Id.* at 19.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.*

<sup>12</sup> 384 U.S. 436 (1966). See Cooke, *supra* note 1 at 10. See JOHNATHAN LURIE, *MILITARY JUSTICE IN AMERICA, THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980* 40 (2001); Walter T. Cox, *The Army, the Courts and the Constitution: The Evolution of Military Justice*, 118 Mil. L. Rev. 1, 14 (1987).

<sup>13</sup> See generally Cooke *supra* note 1. (BG Cooke's article details the development of military justice and the UCMJ from the year 1775 to 2000).

<sup>14</sup> See JUDGE ADVOCATE GENERAL OF THE NAVY, *INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION*, 1152-3 (2000) (Mr. Larkin speaking before the House Committee on Armed Services March 31, 1949).

<sup>15</sup> See JUDGE ADVOCATE GENERAL OF THE NAVY, *INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE: 50TH ANNIVERSARY EDITION* *supra* note 14, at 1152-4. See also THE U.S. ARMY

questions of law, to instruct the court members prior to their deliberation. The law officer would also rule on motions to dismiss or even declare mistrials, and rule on motions for dismissal, but the court members could overrule those decisions if they chose.<sup>16</sup>

During the first major overhaul of the UCMJ in 1968, Congress created the position of military judge to preside over court-martial proceedings.<sup>17</sup> This was a major advancement for the military justice system.

The addition of the position of military judge in 1968 was not just a change in title, it was a revolutionary leap forward that gave the courts-martial enough power and authority to offset the influence commanders formerly exercised over the system.<sup>18</sup> In creating the position of military judge, Congress raised the level of military justice practice to conform more closely to trial procedures in U.S. District Courts.<sup>19</sup> It also enhanced the prestige and effectiveness of the judge advocates presiding over courts-martial, making their status equal to that of civilian trial judges.<sup>20</sup> The rulings of the military judge at trial were binding on the members, and sessions of court were controlled totally by the judge.<sup>21</sup>

Further enhancing the power of the military judge, the 1968 amendments to the UCMJ created a wholly independent trial judiciary.<sup>22</sup> As stated above, before 1968, the convening authority designated the law officer for each court-martial. The law officer was subject to the convening authority's control and beholden to the chain of command for efficiency reports and discipline.<sup>23</sup> Since 1968, military judges have been free of

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COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968 233 (1985) (statement of MG Kenneth J. Hodson, The Judge Advocate General of the Army before the House Subcommittee on Armed Forces, September 14, 1967).

<sup>16</sup> *Id.* at 1154.

<sup>17</sup> *See Cox, supra* note 12, at 19.

<sup>18</sup> *See Cooke, supra* note 1 at 13.

<sup>19</sup> *See THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968 supra* note 16 at 64.

<sup>20</sup> *Id.*

<sup>21</sup> *See id.* *See also* Jacob Hagopian, *50th Anniversary of the UCMJ Series: The Uniform Code of Military Justice in Transition*, 2000 Army Law 1, 2-3 (July, 2000).

<sup>22</sup> *See Cooke, supra* note 1 at 14.

<sup>23</sup> *Cf. THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968 supra* note 16, at 230-231 (statement of Hon. Charles E. Bennett before House Subcommittee on Armed Forces, September 14, 1967, discussing merits of law officers not appointed by the convening authority). *But see, e.g.,* Eugene Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 Wake Forest L. Rev. 1213, 1228 (1997) (discussing instances of cases where military judges independence was questionable).

those types of concerns because they are assigned by and directly responsible to the Judge Advocate General or his designee, the Chief of the Trial Judiciary.<sup>24</sup> As a result, accused service members need not worry that the person sitting on the bench has ulterior motives when hearing or presiding over cases.

In light of the system in place before 1968, the immense potential for error prejudicial to the accused inherent in a pre-1968 court-martial was manifest. Legal errors were common and the rights of the accused were often ignored.<sup>25</sup> Today, the presence of highly qualified military judges at courts-martial ensure that trials are conducted fairly and in accordance with the law, and the rights of the accused protected.<sup>26</sup>

#### **D: Similarities Between the Pre-1968 Justice System and the Military Commission System**

The commission system is markedly, and regrettably, similar to the pre-1968 military justice system. For example, there is no judge. While the presiding officer is a former member of the military judiciary, he is not a judge. The commission as a whole acts as both finder of fact and finder of law. This is exactly the same situation that

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<sup>24</sup> UCMJ art. 26(c) states:

The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

UCMJ art. 26(c) (2002); *See also*, Cooke, *supra* note 1, at 14.

<sup>25</sup> *See id.* at 74-80 (committee discussions regarding problems with special courts-martial in which there was no judge or defense counsel. Congressman Bray highlighted a Marine Corps case where a Marine, later judged to be insane, was punitively discharged with a BCD).

<sup>26</sup> *See Weiss v. United States*, 510 U.S. 163, 194 (1994). Justice Ruth Bader Ginsberg stated,

The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards behind when they enter military service. Today's decision upholds a system notably more sensitive to due process concerns that the one prevailing through most of our country's history, when military justice was done without any requirement that legally-trained officers preside or even participate . . . .

*Id.* *See also* *Loving v. United States*, 517 U.S. 748 (1996). *See generally* Cooke, *supra* note 1, at page 9.

existed before 1968 when the “law officer,” who was a judge advocate, presided over courts-martial.

This framework was abandoned after 1968 because it was unworkable and unfair to the accused. In those situations in which court members chose to ignore the law officer, they did, often unfairly prejudicing the rights of the accused. However, in many cases the converse was true: the law officer, by virtue of his legal training and status, often ran roughshod over the members, exerting undue influence over their decisions and deliberations – again, often unfairly prejudicing the rights of the accused. This lack of consistency and predictability is a hallmark of a vague and arbitrary system that cannot withstand constitutional scrutiny.

In addition, the Presiding Officer in the military commission has been chosen by the Appointing Authority, a figure equivalent to the Convening Authority in the military justice system. Being so appointed, the Presiding Officer is completely beholden to the Appointing Authority, in this case not only for administrative matters, but indeed for his very presence on active duty as a military officer – in effect, his very position with the commission (and more broadly, with the Department of Defense). The appearance of and potential for unlawful command influence, prejudicial to the accused, is starkly evident in such a system. Such relationships between the authority empowered to convene military criminal tribunals and members of the tribunal were rejected as unfair and inappropriate over 35 years ago.

#### **E: The Current Commission System Has Ignored U.N.-Approved Commission Rules**

In 1953, the United Nations Command, Korea, formulated rules for trying individuals before military commissions for offenses associated with the United Nations operations on the Korean peninsula.<sup>27</sup> These rules provided significantly more protections for accused individuals than the current commission system. For example, the Korean Commission Rules explicitly stated that “[t]he order of proceedings of trial shall conform generally to that prescribed for general courts-martial . . . in the armed forces of the convening authority.”<sup>28</sup> For the United States, this rule signified that military commissions would have been run just like courts-martial.

Moreover, the Korean Commission Rules specified that “[t]hese commissions **will follow the rules of evidence prescribed in the Manual for Courts-martial (MCM), United States, 1951 . . .**” (emphasis added). This standard is vastly different from the standard for the proposed commission system. Even in 1951, the standards for admissibility of evidence were far more stringent than the pathetically weak and

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<sup>27</sup> See U.N. SUPPLEMENTAL RULES OF CRIMINAL PROCEDURE FOR MILITARY COMMISSIONS OF THE UNITED NATIONS COMMAND KOREA, 17 March 1953.

<sup>28</sup> See *id.*

imprecise “have probative value to a reasonable person” standard for admissibility set forth in the President’s Military Order of 13 November 2001.<sup>29</sup>

The effect of such an evidentiary standard is obvious: it stacks the deck in favor of the prosecution, permitting introduction of incompetent and unreliable evidence as a substitute for the type of proof demanded by all justice systems, military and/or civilian, that treat fairness as a priority. It represents an unfortunate return to an outdated system that was jettisoned for precisely the reason that the current system is invalid: it promotes unfair proceedings that generates unjust results.

#### **F: Conclusion**

The archaic and discredited procedures the Department of Defense has adopted for the trial of Mr. Hicks by this commission are not congressionally sanctioned. Their use in this important case--one in which Mr. Hicks faces life imprisonment--would represent a miscarriage of justice arguably unparalleled in the history of United States military jurisprudence. The commission system, as currently constructed, will not afford Mr. Hicks a full and fair trial. Accordingly, it does not comport with the PMO, and lacks jurisdiction to try Mr. Hicks.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. **Relief Requested:** The defense requests that the commission dismiss all charges against Mr. Hicks.

6. **Evidence:** Attachments:

1. United Nations Supplemental Rules of Criminal Procedure for Military Commission of the United Nations Command, Korea (1953).

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<sup>29</sup> The 1951 MCM contained “. . . rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . , and prohibited hearsay evidence, involuntary confessions, and confessions obtained after confinement and deprivation of privileges. See MCM, United States, 1951 pg. 236-297.

7. **Oral Argument:** The defense requests oral argument on this motion.

By:



M.D. MORI

*for*

Major, U.S. Marine Corps  
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**U.N. Supplemental Rules of Criminal Procedure for Military  
Commissions of the United Nations Command, Korea**  
(Revised thru 17 March 1953)

**SECTION I. SCOPE, PURPOSE, AND CONSTRUCTION**

**RULE 1. SCOPE OF RULES.** These rules shall govern all Military Commissions of the United Nations Command conducting trials of prisoners of war charged with postcapture offenses, all reviews of such trials, and the submission and action upon all petitions for New Trial.

**RULE 2. PURPOSE AND CONSTRUCTION OF RULES.** These rules are intended to provide for the just determination of all proceedings; they shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable delay.

**SECTION II. THE COMMISSIONS**

**RULE 3. TYPES.** There shall be two types of Military Commissions for the trial of prisoners of war for postcapture offenses: Special Military Commissions and General Military Commissions.

**RULE 4. JURISDICTION OVER PERSONS.** These Commissions shall have jurisdiction over all prisoners of war who are in the custody of the convening authority at the commencement of the trial and during the arraignment.

**RULE 5. JURISDICTION OVER OFFENSES.** These Commissions shall have jurisdiction over all postcapture offenses, including but not limited to, all violations of the laws and cus-

toms of war, all violations of the laws of the Republic of Korea, all violations of rules, regulations, or orders, applicable to prisoners of war, promulgated by the Commander-in-Chief, United Nations Command, or his authorized representatives, all violations of rules, regulations, or orders of prisoner of war camp commanders or their authorized representatives, and all other acts to the prejudice of good order and discipline among prisoners of war.

#### RULE 6. MEMBERSHIP OF COMMISSIONS.

a. *Appointment.* The members of each Military Commission will be appointed by the Commander-in-Chief, United Nations Command, or under authority delegated by him. Unless specifically provided in the delegation of authority, a commander to whom the authority to convene such commissions is delegated will not further delegate such authority.

b. *Number.*

(1) Each General Military Commission shall consist of not less than five members.

(2) Each Special Military Commission shall consist of one or more members but not more than three members.

c. *Designation.*

(1) The order appointing a General Military Commission shall designate a President and a Law Member. The same individual may be designated both President and Law Member.

(2) The order appointing a Special Military Commission shall designate a President.

d. *Eligibility.*

(1) Any commissioned officer of the armed forces of the United Nations Command, including any commissioned officer of the armed forces of the Republic of Korea, shall be eligible for membership on a Commission.

(2) The convening authority may, in his discretion, appoint as a member

of a Commission any civilian who is a citizen of any nation of the United Nations, including any citizen of the Republic of Korea.

e. *Representation.* Where an offense involves victims of more than one nation, each such nation, in the discretion of the convening authority, may be represented on the Commissions.

f. *Vacancies.* Any vacancy occurring among the members may be filled, or any additions to a Commission may be made, by the convening authority, but the substance of all proceedings had and evidence taken in the case then on trial shall be made known to the new member. The fact that the substance of all proceedings had and evidence taken in the case has been made known to the new member will be announced by the President of a Commission in open court.

#### RULE 7. QUALIFICATIONS OF MEMBERS OF COMMISSION.

a. *General.* The convening authority shall appoint to a Commission only persons competent to perform the duties involved and not disqualified by personal interest or prejudice; provided that no person shall sit as a member of a Commission in any case in which he is the accuser or investigator or in which he may be required as a witness for the prosecution....

#### RULE 14. POWERS OF THE COMMISSIONS.

a. *General.* The Commissions shall have power to impound money and property, compel the attendance and detention of witnesses, require witnesses to produce documents and property, punish for contempt, debar from practice before the Commission any

Counsel for cause subject to review by the convening authority, administer oaths and affirmations, and issue search warrants and warrants of arrest.

*b. Contempts.*

(1) A General Military Commission shall have the power to punish for contempt by imprisonment not exceeding six months, or by fine not exceeding \$500.00, or by both fine and imprisonment, any disobedience of its mandates or any contempt.

(2) A Special Military Commission shall have the power to punish for contempt by imprisonment for one month or by fine not exceeding \$50.00, or by both fine and imprisonment, any disobedience of its mandates or any contempt.

*c. Rules and Forms.* A Commission shall have the power to adopt supplementary rules and forms to govern its procedure, not inconsistent with the provisions hereof.

**RULE 15. AUTHORIZED PUNISHMENT.**

*a. General Military Commission.* A General Military Commission may sentence an accused, upon conviction, to death, to confinement at hard labor for life or for any lesser term, or such other punishment as the Commission shall determine to be proper, consistent with the customs of war in like cases in the armed forces of the nation of the convening authority.

*b. Special Military Commission.* A Special Military Commission may not sentence an accused, upon conviction to confinement at hard labor for more than six months, but may sentence the accused to confinement at hard labor for six months or for any lesser term, as the Commission shall determine to be proper, consistent with the customs of war in like cases in the armed forces of the nation of the convening authority.

*c. General.* The Table of Maximum Punishments or its equivalent, in effect in the armed forces of the nation of the convening authority, shall be used as a guide in determining proper punishment....

**SECTION III. TRIAL**

**RULE 17. CONDUCT OF TRIAL.** The Commissions shall confine each proceeding strictly to a fair, expeditious trial of the issues raised, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference; hold public sessions except when otherwise required by the dictates of military necessity; hold each session at such time and place as it shall determine, or as may be directed by the convening authority.

**RULE 18. TRIAL PROCEDURE.** The order of proceedings of trial shall conform generally to that prescribed for general courts-martial, or its equivalent, in the armed forces of the nation of the convening authority. A suggested guide for procedure before Military Commissions is attached as Annex A.

**RULE 19. JOINT AND COMMON TRIALS.** Two or more persons may be tried together wherever jointly charged in any specification. Common trials may be held if two or more accused are alleged to have participated in the same act or acts, or in related acts, or in the same series of acts, constituting an offense or offenses.

**RULE 20. PRESENCE OF LAW MEMBER.** A General Military Commission shall not receive evidence upon any matter, nor shall it vote upon its findings or sentence, in the absence of the Law Member. When the Law Member is absent at any time during the trial, the Commission will adjourn until the Law Member is present or a New Law Member is appointed.

**RULE 21. PROSECUTIONS AND PROCESS.** All prosecutions before the Commissions shall be conducted, and all process returnable to such Commissions shall issue, under the authority of the United Nations.

**RULE 22. CHARGES AND SPECIFICATIONS.**

a. *Nature and Contents.* Charges and specifications shall be based on personal knowledge, or information and belief, and signed under oath by a member of the armed forces of the United Nations Command. Each charge and specification shall consist of a plain, concise, and clear statement of the essential facts constituting the offense charged.

b. *Surplusage.* A Commission may strike surplusage from the charges and specifications, and should do so when such action is plainly indicated.

c. *Amendments.* A Commission may permit the charges and specifications to be amended at any time before the findings, if no additional offense is charged and if the substantial rights of the accused are not prejudiced thereby.

d. *Bill of Particulars.* A Commission may direct in its discretion that the prosecution file a Bill of Particulars. A Bill of Particulars may be amended at any time subject to such conditions as justice requires....

RULE 24. PRESENCE OF THE ACCUSED. The accused shall be present at all times during the trial, except during any period of escape from custody after arraignment. The accused's presence shall not be required upon any review of his case, nor upon consideration of any petition for a New Trial.

RULE 25. SPECIFIC RIGHTS OF THE ACCUSED.

a. *Service of Charges.* Upon reference for trial, the accused shall be furnished a copy of the charges and specifications against him. If the charges and specifications are stated in a language other than one which the accused understands, they shall be made known to him in a language understood by him.

b. *As a Witness.*

(1) The accused shall be entitled to remain silent, or, at his own request but not otherwise, to be sworn to testify as a witness in his own behalf, or to make an oral unsworn statement to the Commission.

(2) The Law Member of a General Military Commission or the President of a Special Military Commission may, at the request of the accused, permit him to testify as a witness for a limited purpose only, excepting therefrom all testimony relative to the issue of his guilt or innocence.

(3) The accused shall be entitled to testify as a witness in his own behalf with respect to less than all the offenses charged against him, in which case he may not be questioned about any offenses concerning which he does not testify.

c. *Representation by Counsel.*

(1) The accused shall be entitled, if he so desires, to assistance by one of his prisoner comrades in the conduct of his defense, and to be represented prior to and during trial by Counsel appointed by the convening authority, or by available Counsel of his own choice.

(2) The accused shall be entitled to reasonable opportunity to consult with his Counsel before and during the trial.

(3) The accused shall be entitled to representation by Counsel until completion of all appellate review on his case or until the expiration of the time during which he may submit a petition for a New Trial, whichever is later.

d. *Defense Witnesses.* An accused shall be entitled to call witnesses to testify in his behalf and to have all reasonable facilities in this regard extended to him.

e. *Cross Examination.* The accused shall be entitled to cross examine, personally or through Counsel, each adverse witness who personally appears before the Commission.

*f. Challenges.*

(1) Each accused shall be entitled, except as otherwise provided herein, to challenge any member of the Commission for cause, and to present evidence relative to such challenge.

(2) Each accused shall, except as otherwise provided herein, be entitled to one peremptory challenge.

*g. Interpretation for Accused.* The accused shall be entitled to have the substance of the proceedings and any documentary evidence translated when he is unable otherwise to understand them, and, in addition, the accused shall be entitled, if he deems it necessary, to the services of a competent interpreter.

**RULE 26. PRIVILEGES AND FACILITIES AFFORDED DEFENSE COUNSEL.** Advocate or Counsel conducting the defense on behalf of the accused, upon trial, review, and consideration of a petition for a New Trial, shall have at his disposal the reasonably necessary facilities to prepare the defense of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defense, including prisoners of war.

**RULE 27. TIME OF TRIAL.**

*a. Limitation on Commencement of Proceedings.* Trial shall not commence until the expiration of a period of at least three weeks from the date of the receipt by the accredited Delegate of the International Committee of the Red Cross, the Prisoners' representative, and the accused of the notice required by Rule 53, below.

*b. Preparation of Defense.* No trial shall commence until the Advocate or Counsel conducting the defense on behalf of the accused shall have had at his disposal a period of at least two weeks to prepare the defense of the accused.

*c. Timely Selection of Individual Defense Counsel.* An accused shall be afforded reasonable opportunity before trial to secure Counsel of his own choice, but no court shall be prevented from proceeding because of the inability of an accused to secure Counsel of his own choosing.

**RULE 28. PRELIMINARY MOTIONS.** Prior to trial, both prosecution and defense will furnish opposing Counsel copies of any preliminary motions to be made to the Commission....

**RULE 30. CHALLENGES.**

*a. For Cause.* No challenges for cause may be asserted in the case of trial by a Special Military Commission consisting of only one member.

*b. Peremptory.* No peremptory challenge may be asserted against the Law Member of a General Military Commission, nor in the case of trial by a Special Military Commission, consisting of only one member.

**RULE 31. RELIEF FROM PREJUDICIAL JOINDER.** For good cause shown, a Commission may, in its discretion, grant a severance in the case of a joint or common trial, or provide whatever other relief justice requires.

**RULE 32. PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF.** The accused shall be presumed innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. If there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted. If there is a reasonable doubt as to the guilt of the accused of the specific offense charged but the evidence supports a finding of guilty of an offense reasonably included therein, then the finding should be as to the latter only. The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the prosecution.

RULE 33. EVIDENCE. These commissions will follow the rules of evidence prescribed in the Manual for Courts-Martial, United States, 1951....

RULE 37. VOTING.

a. *Findings and Sentence.*

- (1) All voting on the findings and sentence shall be by secret written ballot.
- (2) The concurrence of at least two-thirds of the members of the commission present at the time the vote is taken shall, except as provided herein, be necessary for conviction and for sentence.
- (3) The concurrence of at least three-fourths of the members of the Commission present at the time the vote is taken shall be required for any sentence to life imprisonment or confinement in excess of ten years.
- (4) The concurrence of all the members of the Commission present at the time the vote is taken shall be required for any death sentence....

SECTION VI. MISCELLANEOUS

RULE 46. DOUBLE JEOPARDY. No accused shall be punished more than once for the same act or on the same charge pursuant to United Nations authority.

RULE 47. EX POST FACTO OFFENSES. No person shall be tried pursuant to these Rules for an act which was not forbidden by recognized law in effect at the time the said act was committed.

RULE 48. OFFICIAL POSITION AND SUPERIOR ORDERS. The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Action pursuant to the order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if a Commission determines that justice so requires.

RULE 49. PRINCIPALS AND ACCESSORIES. Anyone who commits any of the offenses defined in Rule 5, or who aids, abets, counsels, commands, permits, induces, or procures its commission, is a principal; and anyone who causes an act to be done, which, if directly performed by him, would be an offense under Rule 5, is also a principal and punishable as such....

RULE 53. NOTICE OF TRIAL.

a. *Persons Upon Whom Served.* Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, such Delegate shall be notified at the address previously indicated by him to the convening authority, as soon as possible and at least three weeks prior to trial, that judicial proceedings will be instituted against the accused. The prisoner's representative and the accused shall be similarly notified.

b. *Contents of Notice.* The notice required by Rule 53a, above, shall contain the following information: (1) surname and first name of the accused, his rank, his army, regimental, personal, or serial number, his date of birth, and his profession or trade, if any; (2) place of internment or confinement; (3) specification of the charge or charges on which the accused is to be arraigned, giving the legal provisions applicable; (4) designation of the Commission which will try the case, likewise the date and place fixed for the opening of the trial.

c. *Affidavit of Prosecutor.* The Prosecutor shall execute an affidavit certifying that the duties prescribed in subparagraph a of this Rule have been performed. Such affidavit shall be incorporated into the record as one of the allied papers of the case.

RULE 54. PARTICIPATION OF INTERNATIONAL COMMITTEE OF THE RED CROSS.

a. *Presence at Trial.*

(1) Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, such Delegate, if present, shall be entitled to attend all trials held pursuant to these Rules unless the proceedings are held in camera for purposes of state or military security. (No proceedings in camera will be held, however, without the concurrence of the Commander-in-Chief, United Nations Command, or his successor.)

(2) Where such Delegate has requested permission to attend proceedings to be held in camera, this request will be communicated immediately to Headquarters, United Nations Command. Attention: Command Judge Advocate.

b. *Selection of Counsel.*

(1) Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, the convening authority shall furnish such Delegate, on request, a list of available persons qualified to present the defense.

(2) Failing a choice of Counsel by the accused, the Delegate of the International Committee of the Red Cross, if requested, may select available Counsel for him and shall have at his disposal at least one week for such purpose.

(3) In the event that both the accused and International Committee of the Red Cross Delegate fail to select Counsel, the accused shall be represented by the Defense Counsel designated in the order appointing the Commission.

(4) Where the accused or the International Committee of the Red Cross Delegate retains individual Counsel to represent the accused, the Defense Counsel named in the order appointing the Commission may be excused from the proceedings or retained as advisory, associate, or assistant Defense Counsel, at the option of the accused.